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06                   UNITED STATES DISTRICT COURT  
07                   WESTERN DISTRICT OF WASHINGTON  
08                   AT SEATTLE

09 DENNIS FLOKER,   ) CASE NO. C06-1465-RSM-MAT  
10   ) )  
11 Plaintiff,   ) )  
12   ) )  
13 v.   ) ORDER RE: MOTION TO DISMISS  
14 CONGREGATION PIDYON   ) ) AND STAY DISCOVERY  
15 SHEVUYIM, et al.,   ) )  
16   ) )  
17 Defendants.   ) )  
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Plaintiff Dennis Florer proceeds *pro se* and *in forma pauperis* (IFP) in this 42 U.S.C. § 1983 action. He alleges a denial of religious reading materials and spiritual leadership from defendants Congregation Pidyon Shevuyim (a religious organization), Jewish Prisoners Services (an outreach program of that organization), and Gary Friedman (Chairman of the outreach program). (Dkt. 6.) In his complaint, plaintiff refers to a contract between defendants and the Washington State Department of Corrections. (*Id.* at 3.)

Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and to stay discovery. (Dkt. 10.) In seeking dismissal, defendants rely in large part on the reasoning of an Eighth Circuit Court of Appeals decision. With respect to the stay requested,

01 defendants point to the extensive discovery undertaken in a similar case filed by plaintiff, now  
 02 pending in the Eastern District of Washington. *See Florer v. Peck*, No. C05-5039EFS.

03 Plaintiff objected to defendants' motion, raising new facts and attaching a declaration.  
 04 (Dkts. 11 & 12.) Also, although stating that his claims should be developed through discovery  
 05 and other pre-trial procedures, plaintiff conceded that “[t]his case falls more on questions of law  
 06 than factual evidence that is not already in [his] possession[.]” (Dkt. 11 at 11.) Following a reply  
 07 from defendants (Dkt. 14), plaintiff submitted an additional response, providing even more detail  
 08 as to the nature of his claims and attaching numerous documents (Dkt. 16).

09 On a Rule 12(b)(6) motion to dismiss, the Court must accept all of the material allegations  
 10 in plaintiff's complaint as true and liberally construe those facts in the light most favorable to  
 11 plaintiff, as a *pro se* litigant. *See Oscar v. University Students Co-op Ass'n*, 965 F.2d 783, 785  
 12 (9th Cir. 1992); *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984).  
 13 “Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts  
 14 alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699  
 15 (9th Cir. 1988).

16 Where “matters outside the pleading are presented to and not excluded by the court,” a  
 17 Rule 12(b)(6) motion is “treated as one for summary judgment and disposed of as provided in Rule  
 18 56,” while allowing all parties a “reasonable opportunity to present all material made pertinent to  
 19 such a motion by Rule 56.” Fed. R. Civ. P. 12(b). In transforming a dismissal into a summary  
 20 judgment proceeding, the Court must inform a plaintiff proceeding *pro se* that it is considering  
 21 more than the pleadings and afford the opportunity to present all pertinent material. *Anderson v.*  
*Angelone*, 86 F.3d 932, 934 (9th Cir. 1996); *Lucas v. Department of Corr.*, 66 F.3d 245, 248 (9th

01 Cir. 1995). "If the pro se litigant is a prisoner, the district court's duties are even greater: 'The  
 02 district court is obligated to advise prisoner pro se litigants of Rule 56 requirements.'" *Anderson*,  
 03 86 F.3d at 935 (quoting *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988)).

04 In this case, the Court finds appropriate the conversion of defendants' motion to dismiss  
 05 to a Rule 56 motion for summary judgment. In so doing, the Court advises plaintiff of the  
 06 following:

07 A motion for summary judgment under Rule 56 of the Federal Rules of Civil  
 08 Procedure will, if granted, end your case.

09 Rule 56 tells you what you must do in order to oppose a motion for summary  
 10 judgment. Generally, summary judgment must be granted when there is no genuine  
 11 issue of material fact -- that is, if there is no real dispute about any fact that would  
 12 affect the result of your case, the party who asked for summary judgment is entitled  
 13 to judgment as a matter of law, which will end your case. When a party you are suing  
 14 makes a motion for summary judgment that is properly supported by declarations (or  
 15 other sworn testimony), you cannot simply rely on what your complaint says. Instead,  
**you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.**

16 *Rand v. Rowland*, 154 F.3d 952, 962-963 (9th Cir. 1998) (emphasis added). Furthermore, Local  
 17 Rule CR 7(b)(2) states that a party's failure to file necessary documents in opposition to a motion  
 18 for summary judgment may be deemed by the court to be an admission that the opposition is  
 19 without merit.

20 In converting this motion, the Court stresses that both plaintiff and defendants should take  
 21 the opportunity to present all arguments and material pertinent to a Rule 56 motion. Accordingly,  
 22 the Court hereby requests additional briefing from the parties. Defendants shall submit such

01 briefing and supportive material on or before **May 10, 2007** and plaintiff shall respond on or  
02 before **May 28, 2007**. Defendants may submit a reply on or before **June 1, 2007** and defendants'  
03 dispositive motion is hereby renoted for consideration as of that same date.

04 Also, the Court finds reasonable defendants' request to stay discovery in this matter  
05 pending resolution of their motion. As noted by defendant, this Court "has wide discretion in  
06 controlling discovery." *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). The Court  
07 may exercise that control while a dispositive motion is pending. *See, e.g., Rae v. Union Bank*, 725  
08 F.2d 478, 481 (9th Cir. 1984) (upholding district court's decision to stay discovery pending  
09 resolution of a Rule 12(b)(6) motion to dismiss; noting: "As the district court correctly observed,  
10 discovery is appropriate where there are factual issues raised by the motion. Here, there were no  
11 factual issues.") In a pending case raising the same allegations pursued here, but brought against  
12 different defendants, plaintiff submitted some 1,800 discovery requests and the defendants  
13 produced over 3,100 documents. (*See* Dkt. 10, Ex. 1.) Moreover, as stated above, plaintiff  
14 concedes that his case concerns predominantly questions of law, rather than factual evidence not  
15 already in his possession. (*See* Dkt. 11 at 11.) Indeed, it is apparent from plaintiff's submissions  
16 to the Court that he has in his possession a significant amount of documentation pertinent to his  
17 claims in this case. (*See* Dkts. 11, 12 & 16.) The Court, therefore, finds ample basis for granting  
18 defendants' request to stay discovery.

19 For the reasons described above, the Court hereby notifies the parties as to the conversion  
20 of defendants' motion to dismiss to a Rule 56 motion for summary judgment, requests briefing  
21 from the parties in accordance with the above-described schedule, and grants defendants' request  
22 to stay discovery. The Clerk is directed to send copies of this Order to plaintiff, to counsel for

01 defendant, and to the Honorable Ricardo S. Martinez.

02 DATED this 18th day of April, 2007.

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Mary Alice Theiler  
United States Magistrate Judge